FILED
MAR 31 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1247

FRANKLIN NIX,

Petitioner,

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, Franklin W. Nix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 17, 1971.

OPINIONS BELOW

The opinions of the District Court are unreported and appear in the Appendices hereto as Appendix A and Appendix B. The opinion of the Court of Appeals, reported at 452 F. 2d 794, appears in the Appendices hereto as Appendix C. The opinion of the Court of Appeals upon the petitioner's motion for rehearing and suggestion for rehearing *en banc*, not yet reported, appears in the Appendices hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 17, 1971. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 5, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a district court may abridge the procedural and substantive requirements of Rules 12 (b) and 56 (c) of the Fed. R. Civ. P., by treating a Rule 12 (b) (6) motion to dismiss as a motion for summary judgment and entering summary judgment thereon based on principles of collateral estoppel when: (1) no matters outside the pleadings were presented to the court by respondent; (2) no record of the prior proceeding alleged to be the basis of collateral estoppel was before the court; (3) no notice was given petitioner of the court's contemplation of summary judgment; and (4) no hearing was afforded petitioner on the issue of summary judgment.

2. Whether, as a matter of law, a union member's private civil action in federal district court under the

Labor-Management Reporting and Disclosure Act of 1959, alleging § 609 unlawful union discipline in reprisal for the exercise of free speech under § 101 (a) (2) of the LMRDA, is barred, under principles of collateral estoppel, by a prior NLRB adjudication of the union member's unfair labor practice charges under §§ 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 12(b):

How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 56(c):
Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

§101 (a) (2) LMRDA, 29 U.S.C. §411 (a) (2):
Freedom of speech and assembly.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and

to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§102 LMRDA, 29 U.S.C. §412:

Civil action for infringement of rights; jurisdiction.

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

§103 LMRDA, 29 U.S.C. §413:

Retention of existing rights of members.

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§609 LMRDA, 29 U.S.C. §529:

Prohibition on certain discipline by labor organization.

It shall be unlawful for any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

This action was instituted on June 3, 1970, in the United States District Court for the Northern District of Georgia by petitioner Franklin W. Nix, against the International Association of Machinists and Aerospace Workers (Union). Petitioner invoked the jurisdiction of the district court under § 102 of the Labor-Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U.S.C. § 412. Petitioner alleged that he is a member in good standing and was employed by the union as a staff representative for 11 years until his discharge in September 1966. Petitioner further alleged that he was unlawfully disciplined in that he was discharged for exercising his right of free speech under § 101 (a) (2) of the LMRDA, 29 U.S.C. § 411 (a) (2), in violation of the unlawful discipline prohibitions of § 609 of the LMRDA, 29 U.S.C. § 529.

On June 26, 1970, the defendant union filed a 12 (b) motion to dismiss based upon four grounds: (1) prior action pending; (2) principles of *res judicata;* (3) principles of collateral estoppel, splitting causes of action, and election of remedies; (4) want of jurisdiction and failure to state a claim upon which relief could be granted. In support of its motion to dismiss, the defendant union submitted two memorandums of law. But at no time did the union file a motion for summary judgment, nor were any affidavits, interrogatories, depositions, or other matters outside the pleadings submitted by the union to the district court. No record of a prior NLRB proceeding which allegedly formed the basis of the defense of collateral estoppel was submitted to the district court.

The district court, having given petitioner no notice

of its contemplation of summary judgment nor a hearing on summary judgment, rendered summary judgment for the defendant based on principles of collateral estoppel, said judgment entered on August 13, 1970 (Appendix A). Petitioner was not given a hearing or afforded an opportunity to present material in opposition to summary judgment as required by Rule 56 (c) of the Fed. R. Civ. P. Motions for reconsideration were filed by both parties, and said motions were overruled by judgment entered November 16, 1970 (Appendix B).

In its decision the district court noted several times that petitioner had stated a claim upon which relief could be granted under LMRDA, but held that relief was barred under principles of collateral estoppel by the prior NLRB adjudication. The district court concluded, without having the record of the NLRB proceeding before it, that the controlling issues of fact surrounding petitioner's discharge from union employment had been determined adversely to petitioner by the NLRB. The NLRB decision had been affirmed by the Fifth Circuit Court of Appeals in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969). The Court of Appeals had upheld the finding of the Board that petitioner's discharge from employment did not constitute an unfair labor practice under §§ 8 (a) (1) or 8 (a) (3) of the NLRA.

On appeal of the instant LMRDA action to the Court of Appeals petitioner raised two basic contentions. First, that the district court's entry of summary judgment violated petitioner's procedural and substantive rights under Rules 12 (b) and 56 (c) of the Fed. R. Civ. P. Secondly, that as a matter of law the NLRB had no jurisdiction to adjudicate LMRDA claims, therefore no *public* action to enforce petitioner's rights under §§ 8

(a) (1) and 8 (a) (3) of the NLRA could estop a private civil action to enforce petitioner's rights under §§ 101 (a) (2) and 609 of the LMRDA. Without addressing itself to the question of petitioner's procedural rights, the Court of Appeals affirmed the entry of summary judgment based on principles of collateral estoppel on November 17, 1971 (Appendix C), and denied a timely petition for rehearing on January 5, 1972 (Appendix D).

Although it is petitioner's contention that as a matter of law the NLRB decision cannot estop petitioner from prosecuting his LMRDA action, perhaps a brief summary of the NLRB proceeding will serve to aid the Court's understanding of both the jurisdictional dilemma to which petitioner has been subjected and the jurisdictional implications of an NLRB proceeding collaterally estopping an LMRDA action. Accordingly, a summary of the NLRB proceeding is included in the Appendices hereto as Appendix E.

REASONS FOR GRANTING THE WRIT

The issuance of a writ of certiorari to review the decision of the court below is sought upon the cumulative bases that: (1) the court below has so far sanctioned a departure of the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; (2) the decision of the court below conflicts with its own prior decisions and with the decisions of other courts of appeals; (3) the court below has decided a federal question in a way in conflict with applicable decisions of this Court; and (4) the court below has decided important questions of federal law which have not been, but should be settled by this Court.

I

COMPLAINT STATING CLAIM FOR RELIEF MAY NOT BE DISMISSED BY SUMMARY JUDGMENT WITHOUT AFFORDING PLAINTIFF NOTICE AND OPPORTUNITY TO BE HEARD.

It is important that the federal courts follow both the letter and the spirit of the Federal Rules of Civil Procedure. Without strict adherence to the procedural due process inherent in these rules, the substantive federal rights of plaintiffs may be rendered a nullity. Of all the possible abuses of the Federal Rules, none is more fatal to a plaintiff's substantive federal rights than the abuse of summary judgment procedure. Where the procedure of summary judgment is abused it is imperative that this Court exercise its power of supervision in order that important federal rights not go unenforced for lack of procedural due process in district courts.

Petitioner respectfully shows that the decision of the Court of Appeals below has completely nullified the right of all plaintiffs to notice and an opportunity to be heard prior to the entry of summary judgment. In addition to the fact that petitioner was denied a hearing on the issue of summary dismissal, the defendant union failed to carry the burden of showing that there was no genuine issue as to any material fact to be tried. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970).

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962), this Court set the following guidelines for the application of summary judgment procedure:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and

> admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)."

In this proceeding, genuine issues as to petitioner's LMRDA rights remain to be tried. No forum has as yet adjudicated petitioner's discharge from employment in light of his right to seek out and expose union corruption under §§ 501 (b) and 101 (a) (2) of the LMRDA. If in truth the decision of the NLRB in an unfair labor practice proceeding—a proceeding wherein the NLRB had no jurisdiction over LMRDA claims and wherein LMRDA claims were neither presented to nor considered by the Board—is a bar to petitioner's enforcement of LMRDA rights in district court, then effectively petitioner is without a forum in which to try these issues. Clearly such a dilemma is the making of the Court of Appeals below, for Congress evidenced no such intent in §§ 102 and 103 of the LMRDA.

The decision of the Court of Appeals is contrary to its own prior decisions and the decisions of other courts of appeals upon the same matter.[1] In *Enochs v. Sisson*,

[1] The Court of Appeals decision is internally inconsistent as well. While the court below affirmed the district court's entry of summary judgment in Civil Action No. 13818, despite the fact that

301 F. 2d 125 (5th Cir. 1962), the court below held it an abuse of discretion to grant summary judgment without proper notice and hearing as required by Rule 56. In *Georgia Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 373 F. 2d 493, 497 (5th Cir. 1967), the court quoted in part from *Bowdidge v. Lehman*, 252 F. 2d 366, 368-369 (6th Cir. 1958):

> "* * * Rule 56 (c) provides that a motion for summary judgment requires service 'at least 10 days before the time fixed for the hearing.' We think the spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion. Since attorney for appellants was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous."

Continuing its decision in *Georgia Southern*, the Court of Appeals for the Fifth Circuit referred to *Ullah v. Hoy*, 278 F. 2d 194 (9th Cir. 1960), in support of its own decision and at 373 F. 2d 498 held:

> "The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforeseeable thrust with no chance to parry. Notice

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only a memorandum of law had been presented to the court, the Court of Appeals also affirmed the district court's *refusal* to treat respondent's motion to dismiss as a motion for summary judgment in Civil Action No. 10463. Speaking of the latter action, the court below held:

> "By no stretch of the imagination can the Xerox copies of opinions of this court attached to a memorandum of law submitted by Grand Lodge in connection with the Rule 12 (b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12 (b) (6) motion into a motion for summary judgment." (Appendix C-7)

is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation."

Stated most baldly, petitioner lost his case without a full opportunity to be heard. Petitioner respectfully urges that the correct application of summary judgment procedure is a matter of such ascendant importance to the federal judiciary that it is not too much for this Court to require that the proper application of summary judgment be universal among federal courts. Indeed, the decision of the Court of Appeals in affirming the district court's entry of summary judgment has so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II

AS A MATTER OF LAW, PETITIONER'S LMRDA CLAIM IS NOT BARRED BY THE PRIOR NLRB PROCEEDING.

Petitioner respectfully shows this Court that the collateral estoppel effect of NLRB proceedings upon subsequent LMRDA actions, if any, is a question of utmost importance to all labor organizations and their millions of members throughout the nation. The question also bears most seriously upon the general enforcement of labor legislation in this nation and more specifically bears upon the jurisdiction of the federal courts over LMRDA claims. Essentially the question is addressed to the jurisdictional boundaries between the federal courts under the LMRDA and the National Labor Relations Board under the NLRA. To hold that an unfair labor practice proceeding before the NLRB is a bar to a subsequent LMRDA action is to hold that the NLRB has jurisdiction over LMRDA claims.

The implications of such a holding are of paramount importance to the enforcement of Congressional policy declared in the LMRDA.

This question is one which has not been but should be settled by this Court. The question posed is a logical extension of the preemption issue considered by this Court in *Boilermakers v. Hardeman*, 401 U.S. 233 (1971). In rejecting the union's argument that Hardeman's § 101 (a) (5) LMRDA cause of action was arguably an unfair labor practice within the exclusive competence of the NLRB, this Court held in *Hardeman* at 238-239:

> "The fairness of an internal union disciplinary proceeding is hardly a question beyond 'the conventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181, 193-194 (1967). As we noted in that case, the 86th Congress which enacted § 101 (a) (5) was 'plainly of the view' that the protections embodied therein were new material in the body of federal labor law. 388 U. S., at 194. And that same Congress explicitly referred claims under § 101 (a) (5) not to the NLRB, but to the federal district courts. This is made explicit in the opening sentence of § 102: 'Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.' Of course, '[t]he purpose of Congress is the ultimate touchstone.' *Retail Clerks Local 1625 v. Schermerhorn*, 375 U. S. 96, 103 (1963). And in § 102 Congress has clearly indicated a purpose to refer claims regarding violation of § 101 (a) (5) to the district courts."

Clearly the forum for the determination of a claim under § 101 (a) (2) is the same as the forum for the determination of a claim under § 101 (a) (5).

The NLRA and the LMRDA are two different federal bodies of law. The exclusive jurisdiction of each act is vested in different forums; the scheme of enforcement is public in nature under the NLRA and private in nature under the LMRDA; and the measure of relief available under the acts is radically different. To hold that an NLRB unfair labor practice proceeding is a bar to a subsequent action in district court to enforce membership rights under the LMRDA is to ignore the above distinctions.

Petitioner respectfully shows this Court that the decision of the Court of Appeals for the Fifth Circuit cannot be allowed to stand. To allow an NLRB proceeding to bar a union member's claim under the LMRDA is to sanction the preemption of the jurisdiction of federal courts over the LMRDA by an administrative agency having no jurisdiction over the Act. In § 103 of the LMRDA Congress expressly preserved other state and federal rights in addition to LMRDA rights, but the effect of the Court of Appeals decision is to force an election between these remedies. No union member will in the future seek to enforce his rights under the NLRA if LMRDA claims which cannot be presented to or considered by the Board are thereby cut off by the doctrine of collateral estoppel. Clearly Congress in § 103 of the LMRDA did not intend that union members be put to such an election of rights or remedies.

A further implication of the Court of Appeals decision relates to the remedies available before the NLRB.

Assuming *arguendo* that the Board has the jurisdiction to entertain and accommodate LMRDA claims, the Board still cannot award damages and the other civil relief available in federal courts under the LMRDA. Had the Board, in its discretion, reinstated petitioner to employment based on his LMRDA rights, petitioner would nevertheless have had the right to pursue damages in an LMRDA action in federal court. The fact that the NLRB decided that petitioner's discharge was not for union activity cannot be allowed to eclipse petitioner's union member rights and remedies under the LMRDA. If the decision of the Court of Appeals is allowed to stand, union members who have claims under both the NLRA and the LMRDA will not seek the enforcement of their NLRA rights for fear that their broad remedies under the LMRDA will be cut off by the doctrine of collateral estoppel. Clearly such a result would defy the cumulative nature of LMRDA rights declared in § 103 of the Act.

The plain fact of the matter is that the NLRB will not entertain or consider LMRDA claims. (See Appendix E) The NLRB proceeding which adjudicated petitioner's unfair labor practice charges amply demonstrates that the Board will not consider internal union affairs, yet internal union affairs are the very essence of LMRDA claims. As desirable as it might have been for the Board to accommodate petitioner's LMRDA union membership rights, the Board lacked such jurisdiction. And apparently the NLRB is more conscious of its jurisdictional limitations than is the court below, which has given collateral estoppel effect to an NLRB proceeding in which petitioner's LMRDA rights were not even considered.

As a result of the variant standards between the NLRA and the LMRDA, the NLRB hearing did not adequately consider the factors necessary for an LMRDA violation. The trial examiner was primarily concerned with the question whether the petitioner's union activities led to his discharge. This is understandable considering that the trial examiner was only investigating a possible violation of the National Labor Relations Act. Consequently, he did not fully explore the union membership rights of petitioner under the LMRDA. Had he done so, he would have been acting beyond the scope of his authority since internal union affairs are not within the ambit of the NLRA. *Cf. Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 129 (6th Cir. 1971).

When respondent filed its motion to dismiss upon the ground of collateral estoppel by judgment, and requested the district court to take notice of the Court of Appeals decision in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969), no record of the prior NLRB proceeding was presented to the district court. But the affirmative defense pleaded by respondent imposed upon respondent the burden of showing that petitioner had a full opportunity, in fact as well as theory, to present evidence and argue his LMRDA claims before the NLRB. The respondent union did not carry that burden.

As a matter of law, petitioner had no right to control the proceedings before the NLRB. The Board has never been given jurisdiction to enforce *private* rights. A charge of an unfair labor practice may be presented to the Board, but the person filing the charge does not become the actor in the proceedings. The Board is a public agency acting in the public interest, and no pri-

vate person or group, nor any employee or group of employees is chosen as the instrument of government to assure protection to the public from the described unfair conduct in order to remove obstructions to interstate commerce. *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 264-65 (1940).

As a matter of fact, in the NLRB proceeding petitioner was not permitted to call, examine or cross-examine witnesses; was not allowed to participate in the presentation of evidence other than his own testimony; was not represented by counsel, could not object to testimony offered by respondent in the hearing, and was not permitted to make any argument before the trial examiner. Evidence has different relevance in the context of different statutes. In the NLRB proceeding, petitioner simply was not afforded an opportunity to litigate the circumstances of his discharge in the context of his LMRDA rights as a union member.

The decision of the Court of Appeals is in conflict with the decision of this Court in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394, 422 (1966), wherein this Court held that *res judicata* may apply

> "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which *the parties have had an adequate opportunity to litigate* * * *." (emphasis supplied)

Clearly the decision below violates the principles thus stated, because the district court made no investigation into the adequacy of petitioner's opportunity to litigate LMRDA rights before the NLRB in the prior proceeding.

The decision below conflicts with the court's own prior decision in *Rachal v. Hill*, 435 F. 2d 59, 62 (5th Cir. 1970). There the Court of Appeals held that

> "* * * the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted *had a full and fair opportunity to litigate the issue in the prior proceeding* and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case." (emphasis supplied)

The Court of Appeals based its affirmance of the district court's entry of summary judgment upon its decisions in *H. L. Robertson & Associates, Inc. v. Plumbers Local No. 519*, 429 F. 2d 520 (5th Cir. 1970); and *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F. 2d 1081 (5th Cir. 1969). These cases involved a claim for damages under § 303 of the Taft-Hartley Act [29 U.S.C. § 187], based upon secondary boycotts in violation of § 8 (b) (4) of the NLRA [29 U.S.C. § 158 (b) (4)]. In each case the secondary boycott question was first presented to the NLRB and in both cases the Board found the existence of a secondary boycott. In subsequent damage actions under § 303 of Taft-Hartley, the Board's findings were pleaded as *res judicata* to the issue of liability in the district courts. Both courts granted summary judgment on the issue of liability and the Court of Appeals affirmed.

These two cases are inapposite. Both the NLRB and the district courts had *primary* jurisdiction to determine the existence of a secondary boycott. In each case before the Board, both parties to the dispute were accorded a full hearing on the secondary boycott question; both parties were represented by counsel, with full op-

portunity to present evidence, call, examine and cross-examine witnesses; and fully develop their positions before the Board.

In contrast, the NLRB lacks jurisdiction to adjudicate the claims of union members alleging an infringement of their rights under the LMRDA. Indeed, petitioner's LMRDA claims in this action were never presented to or considered by the NLRB, nor by the Court of Appeals for the Fifth Circuit in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969). Both the Board and the Court of Appeals considered petitioner's discharge only with respect to unfair labor practices affecting his status as an employee. Petitioner in the case at bar now simply seeks to have the circumstances of his discharge considered in light of his rights and duties as a *union member*.

CONCLUSION

It is important that this Court decide both of the questions posed by this appeal. If this action is simply remanded to the district court for a hearing in conformity with Rules 12 (b) and 56 (c) of the Federal Rules of Civil Procedure, there is nothing to indicate that the court will not reapply principles of collateral estoppel. Both the district court and the Court of Appeals have already held that the prior NLRB proceeding is a bar to petitioner's present LMRDA action. Petitioner has no reason to believe that these courts would decide the same question any differently in the future unless otherwise directed by this Court. Thus petitioner may be exposed to the expense and delay of another appeal to this Court unless this Court rules, as a matter of law, that an NLRB adjudication of a union

member's unfair labor practice charges is not a bar to such member's subsequent action in district court to enforce his rights under the LMRDA.

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Petitioner,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Petition for Certiorari upon the respondent by mailing a copy of same, with postage first class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for respondent.

This _____ day of March, 1972.

_____
WILLIAM G. MCRAE
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION NO. 13818

STATUS OF CASES

(Filed: Aug. 13, 1970)

In Civil Action 10463, plaintiff brought an internal union free speech case pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (hereafter

LMRDA), 29 U.S.C.A. §401 *et seq.* seeking injunctive and other relief from his expulsion from union membership. At a full hearing on the question of a preliminary injunction, it was stipulated by the parties that the Court's action would be 'final' on the injunctive features and constitute a complete trial on all issues other than the question of damages. After considering a number of preliminary matters, the Court held that Nix was unlawfully disciplined for making statements protected by LMRDA. An injunction issued, which the Court held also bound the parent international union, the Grand Lodge of the International Association of Machinists and Aerospace Workers. Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000 (N.D. Ga. 1967).

The Local Lodge and Grand Lodge appealed to the Fifth Circuit which affirmed the decision below in all respects except the application of the injunction to the Grand Lodge. The Court of Appeals held that although the substantive elements of a cause of action against the Grand Lodge existed under LMRDA, the District Court had never acquired jurisdiction over the international by virtue of proper designation of the international as a defendant and service of process, and it therefore could not make its injunction applicable to the Grand Lodge as well as the Local Lodge. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 220 (5th Cir. 1969). But the Court of Appeals also held that upon remand, "Nix was entitled to amend and seek relief against the international." *Ibid.*

Accordingly, the plaintiff filed an amendment to his complaint adding the Grand Lodge as a defendant, and requesting appropriate service of process. But instead of asking the Court to remedy his expulsion from union

membership. Nix amended to allege wrongful discharge from his *employment* as Press Representative of the Grand Lodge, and prayed only for reinstatement to his employment and "all other appropriate relief."

The defendants have filed motions to dismiss. The Local Lodge contests the employment aspects of the amendment arguing that no relief for wrongful termination of employment could be granted against it, since it is not party to the employment relationship between Nix and the Grand Lodge. Both the local and the international argue that the Court has no subject-matter jurisdiction over the claim for relief from wrongful discharge, and that the allegations pertaining to wrongful discharge fail to state a claim upon which relief can be granted under LMRDA, or alternatively state a claim which is barred by principles of *res judicata*. While the Grand Lodge did contend that it had not been properly served with process, that contention was subsequently withdrawn when service was admittedly perfected on April 3, 1970.

On April 16, 1970, plaintiff filed a notice of dismissal of his amended complaint against the Grand Lodge. Less than two months later he filed C.A. No. 13818, in the face of which the defendants challenge the notice of dismissal in C.A. 10463 on various technical grounds.

In contrast to C.A. 10463, C.A. 13818 is addressed essentially to plaintiff's former employment with the Grand Lodge. Nix alleges that the Grand Lodge wrongfully, maliciously and wantonly disciplined him by firing him, and having its agent Fulton Lodge No. 2 expel him from membership. Although he does ask the Court to confiscate the record of the union proceedings directed toward expulsion, and to enjoin interference with his

exercise of the right to speak, publish or disseminate his views on union matters—relief directed toward his union membership status—Nix also prays restoration to his employment as press representative, and compensatory and punitive damages.

In Count II of the complaint in C.A. 13818, Nix brings a class action seeking declaratory and injunctive relief against the international's enforcing Article L, Section 3 of the IAM Constitution, on the grounds that the provisions of that section which authorize discipline of any member who circulates or causes to be circulated certain false and malicious statements against union members or officers, are inconsistent with the free speech provisions of LMRDA, *i.e.* 29 U.S.C.A. §411(a)(2).

The defendant international has moved to dismiss C.A. 13818, because of the pending C.A. 10463, on principles of *res judicata*, collateral estoppel, splitting causes of action, election of remedies, for failure to state a claim upon which relief can be granted, and lack of jurisdiction. The Grand Lodge has also moved to strike certain paragraphs of the complaint.

TERMINATION OF EMPLOYMENT

In C.A. 10463, this Court ruled that plaintiff could not invoke jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529, in order to vindicate his right, if any, to employment as press representative by the Grand Lodge. See, Nix v. Fulton Lodge No. 2 of IAM, 262 F. Supp. 1000, 1004 (N.D. Ga. 1967). This ruling was not disturbed on appeal. Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 (5th Cir. 1969). The defendants' motions in C.A. 10463

and 13818 raise questions as to the effect of this ruling under principles of the law of the case and *res judicata*.

Before remand by the Court of Appeals, plaintiff had never sought relief for termination of his employment in C.A. 10463. The Grand Lodge was not a party to this action then. The issue as to the international's status in this litigation was raised for the first time by the local, which at the hearing on December 16, 1966, moved to dismiss for failure to join an indispensable party. The plaintiff, local and the Court agreed that the sole reason for adding the international would be to make certain that any injunction requiring reinstatement to union membership would be effective against all parties which controlled that status. Hearing, Dec. 16, 1966, T-49-50. Plaintiff never did effectively join the Grand Lodge, until remand by the Court of Appeals. Therefore, the issue of relief against the international for terminating plaintiff's employment was not actually raised, and could not have been raised before the amendment now challenged.

Thus, that earlier ruling stands as *dicta* only, and will not be given *res judicata* or collateral estoppel effects on the issue of relief for plaintiff's firing. At most, it is simply the laws of the case enunciated by this Court. This conclusion is reached in spite of the Fifth Circuit's ruling in Fulton Lodge No. 2 of IAM v. Nix, 415 F.2d 212, 217 at n.11 (5th Cir. 1969). All that was held there was that the union-employee and union-officer cases proffered by the local were not relevant to the issue whether the offensive statements were protected by LMRDA, because at that point there was no issue in the case regarding Nix's firing.

The ruling that in a case brought pursuant to Sections 102 and 609 of LMRDA, plaintiff may not vindicate his right, if any, to employment as press representative by the Grand Lodge was based on the premise that these sections may be invoked to protect rights enunciated in Section 101 of LMRDA, 29 U.S.C.A. §411, only when such rights have been violated by acts affecting union membership status. *Accord*, Sewell v. The Grand Lodge of IAM, C.A. No. 3055-N (N.D. Ala., filed July 9, 1970). On reconsideration, the Court feels that the statute should not be construed that narrowly. *Cf.* International Brhd. of Boilermakers v. Braswell, 388 F.2d 193, 200-201 (5th Cir. 1968). Rather, when a plaintiff asserts his union has invoked sanctions in violation of specific rights secured under Section 101, the courts have jurisdiction of his claim even if the particular sanctions applied affect plaintiff's status as an appointed or elected union officer, official or employee, rather than his status as a member. Such sanctions are within the scope of the phrase "or otherwise discipline" as used in Section 609 of LMRDA, 29 U.S.C.A. §529. *See* Grand Lodge of IAM v. King, 335 F.2d 340, 344-345 (9th Cir. 1964), *aff'g.* 215 F. Supp. 351, 354 (N.D. Cal. 1963), *cert. den.* 379 U.S. 920 (1964); Cefalo v. International Union of Dist. 50 Mine Wkrs., 311 F. Supp. 946, 953 (D.D.C. 1970); Retail Clerks Union, Local 648 v. Retail Clerks Intl. Assn., 299 F. Supp. 1012, 1020-1021 (D.D.C. 1969); DeCampli v. Greeley, 293 F. Supp. 746, 751-753 (D.N.J. 1968); Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968); Hill v. ARO Corp., 275 F. Supp. 482, 489 (N.D. Ohio 1967); George v. Bricklayers, M. & P. Int'l. Union of America, 255 F. Supp. 239, 242 (E.D. Wis. 1966); *contra*, Thompson v. New York Central R.Co., 361 F.2d 137, 145 (2d Cir. 1966);

Air Line Stewards and Stewardesses Assn. v. Transport Wkrs. Union, 334 F.2d 805, 808 (7th Cir. 1964); Strauss v. International Bhd. of Teamsters, C.W. and H. of America, 179 F. Supp. 297, 300 (E.D. Pa. 1959). Careful distinction between the rights protected by Section 101 (*e.g.* freedom of speech) and the sanctions invoked in violation of those rights (*e.g.*, expulsion from union membership or termination of employment) reveals that it is not sufficient to simply state that the LMRDA protects only 'membership rights' in the union. For while it is agreed that the LMRDA provides no remedy for union action arguably violating a member's Section 101 rights, but affecting only his employment with some third party, Seeley v. Brotherhood of Painters, etc., 308 F.2d 52, 60 (5th Cir. 1962), the situation is different where a union violates its member's protected rights by action adversely affecting his status as an appointed or elected officer, official or employee of that union. The union may not use the coincidence of that status to restrict that member's Section 101 rights.

Accordingly, in the abstract, the Court has jurisdiction over plaintiff's amendment in C.A. 10463 praying for relief against the Grand Lodge for firing him, and that amendment does state a claim upon which relief can be granted—at least in the sense that plaintiff conceivably could prove a set of facts entitling him to recovery. The same conclusions follow for the claim stated as part of the separate civil action, C.A. 13818. These conclusions are reached in spite of the facts that the Court's prior ruling arguably set the law of the case. It is well recognized that the law of the case does not inexorably bind the court which enunciated it, and at least one commentator recommends that a court reverse itself

when convinced that its previous enunciation was erroneous. 1B Moore's Federal Practice ¶0.404[1]405-409 (2d Ed. 1969).

EFFECT OF NLRB DECISION AND JUDICIAL REVIEW THEREOF

Although it has been determined that the Court has jurisdiction over plaintiff's present claim against the Grand Lodge, and that the relevant allegations do state a claim upon which relief can be granted—at least in the sense that conceivably plaintiff could prove a set of facts entitling him to recovery—it appears that the controlling issue of fact in that claim has been determined adversely to the plaintiff in a prior proceeding, and that under the principles of collateral estoppel, that determination precludes recovery here.

When the plaintiff was fired, he filed unfair labor practice charges with the NLRB, alleging a discriminatory discharge in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act, 29 U.S.C.A. §§158(a)(1) and 158(a)(3). However, the Board found as a matter of fact that Nix had been discharged for pilfering documents from his superior at IAM. Nix v. N.L.R.B., 418 F.2d 1001, 1005 (5th Cir. 1969). On petition for review of the Board's decision, the Court of Appeals affirmed that finding of fact by ruling that there was substantial evidence to support the Board's finding that Nix was discharged "for cause." Nix v. N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969).

In either C.A. 10463 or C.A. 13818, under the principles of collateral estoppel, the Board's finding of fact—made after an adversary hearing and upheld on judicial review—controls the issue of the reasons Nix was fired.

Purvis v. Great Falls B. & C. Trades Council, 266 F. Supp. 661, 662-663 (D. Mont. 1967); *see also* Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 344 F.2d 300, 306 (9th Cir. 1965).

The court is aware that some cases might support a contrary conclusion. However, they were ruling in a different context. In Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local Union No. 584, 359 F.2d 598 (2d Cir. 1966), the Court of Appeals ruled that a decision of the NLRB that a union had violated Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C.A. §158(b)(4) would not be binding on a court confronted with that issue in a civil action brought pursuant to Section 303 of the LMRDA, 29 U.S.C.A. §187. *Id.* at 602, n. 7. *See also* Taube Electrical Contractors v. International Bhd. of Elec. Wkrs, Local Union No. 349, 261 F. Supp. 664 (S.D. Fla. 1966). And in Thompson v. Moore, 223 F.2d 91 (5th Cir. 1955), *aff'g* 131 F. Supp. 658 (S.D. Tex. 1953), the Court of Appeals held that where the Railroad Retirement Board found a former railroad employee still "permanently disabled for work," and the employee proceeded directly to court rather than first exhausting his administrative remedy, the findings of the Board were not conclusive (the term *res judicata* was used by the lower court) in the employee's suit for damages against the railroad which refused to rehire him. 223 F.2d at 93. However, the Court does not deem these cases controlling here.

Accordingly, Nix's claim for relief against the Grand Lodge for firing him fails, whether asserted by amendment in C.A. 10463 or in a separate action, Count I of C.A. 13818. The defendants' motion to dismiss for failure to state a claim upon which relief can be granted—

treated here as a motion for summary judgment—is granted, without prejudice in C.A. 10463 to plaintiff's right to amend as outlined below.

COUNT II OF C. A. 13818

Plaintiff seeks declaratory and injunctive relief against the Grand Lodge, specifically asking the court to strike down Article L, Section 3 of the IAM Constitution on the grounds that it is inconsistent with the free speech provisions of LMRDA, Section 101(a)(2), 29 U.S.C.A. §411(a)(2). He seeks such relief in the form of a class action, alleging that he represents all the members of IAM in the United States.

The scope of the class Nix claims to represent is on its face overly broad. Only the claims of union members against whom Article L, Section 3 is being invoked present a sufficiently justiciable controversy for judicial resolution. *See* Golden v. Zwickler, 394 U.S. 103, 108 (1969); United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). Accordingly, the scope of the class is deemed restricted to such persons.

This claim should have been made by amendment to the complaint in C.A. 10463. It is essentially an allegation that when Local Lodge No. 2 expelled Nix from membership, the international was acting as agent for the Grand Lodge. The claim is therefore very much bound up with plaintiff's claims against the local. Accordingly, C.A. 13818 is dismissed ~~without~~ prejudice to plaintiff's right to amend in C.A. 10463 in order to assert the

claim made in Count II of C.A. 13818, as limited by the immediately preceding part of this opinion.

IT IS SO ORDERED.

This is the 12th day of August, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANKLIN NIX, *Plaintiff,* vs. FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL, *Defendants.*	CIVIL ACTION NO. 10463

FRANKLIN NIX, *Plaintiff,* vs. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendant.*	CIVIL ACTION No. 13818

ORDER THAT ORDER OF AUGUST 13, 1970, DEALING WITH COUNT II STANDS AS ENTERED

(Filed: Nov. 16, 1970)

On August 13, 1970, an order was entered in these two actions. All parties apparently are unhappy with it

and have filed motions to clarify some aspects and reconsider others.

I.

In Civil Action Number 10463, no ruling was made on the defendant Grand Lodge's objection to plaintiff's notice of dismissal. In order to enter further ruling, some chronology is necessary:

February 20, 1970—after remand from the Court of Appeals, plaintiff filed an amended complaint, naming the Grand Lodge as a defendant,

March 10, 1970—amended complaint served on Roy M. Bond, Jr.;

March 30, 1970—motions to dismiss filed by the Grand Lodge (one ground challenged service on Bond), and by Fulton Lodge No. 2;

April 3, 1970—amended complaint served on H. C. Summers;

April 15, 1970—motions to dismiss renewed by both defendants;

April 16, 1970—plaintiff filed a notice of dismissal of the amended complaint against the Grand Lodge.

The Grand Lodge objects that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Fed. R. Civ. P. 41(a)(1), should be considered motions for summary judgment precluding plaintiff from dismissal by stipulation. That defendant's motions were based on three grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted because, a plaintiff may not invoke federal

jurisdiction pursuant to Sections 102 and 609 of LMRDA, 29 U.S.C.A. §§412 and 529 in order to vindicate his right (if any) to employment as press representative by the Grand Lodge; (3) res judicata. Accompanying the Grand Lodge's motions were an affidavit relating to service of process and copies of Fulton Lodge No. 2 v. Nix, 415 F.2d 212 (5th Cir. 1969) (the prior appeal in this case), of Nix v. N.L.R.B., 418 F.2d 1001 (5th Cir. 1969), the Court of Appeals' review of Nix's unfair labor practice charge against the union. The affidavit relates solely to the issue of the validity of the March 10, 1970, service of process. The copies of cases are relevant only to the defense of res judicata.

The Grand Lodge cites Harvey Aluminum Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953). In that case the Court held that even though no answer or motion for summary judgment had been filed, the plaintiff could not voluntarily dismiss by stipulation where issue on the merits had been joined in an extended (3 day) hearing on plaintiff's motion for a preliminary injunction. The Grand Lodge also relies on Butler v. Denton, 150 F.2d 687 (10th Cir. 1945), where the Court of Appeals held that plaintiff had no absolute right of dismissal before the filing of an answer or motion for summary judgment but after the United States filed a petition for intervention which tendered justiciable issues (on the merits). 150 F.2d at 690. And the Grand Lodge finally cites Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961), to the effect that the plaintiff loses his right to dismiss by stipulation once the defendant has filed a motion to dismiss for failure to state a claim upon which relief can be

granted, even if the motion is unaccompanied by affidavits or other extraneous matter.

The Court respectfully rejects the views expressed in *Tele-Views, supra*. Fed. R. Civ. P. 41(a)(1) does not admit of the interpretation that that Court made. The rule simply does not cover the situation in which a defendant has filed a motion to dismiss supported by extraneous matter: under such circumstances, whether to allow dismissal must be resolved by the exercise of sound judicial discretion. Kilpatrick v. Texas & P. Ry. Co., 72 F. Supp. 632, 633 (S.D.N.Y. 1947). For purposes of Fed. R. Civ. P. 41(a)(1) a motion to dismiss accompanied by affidavits or other extraneous matter should not preclude voluntary dismissal by stipulation unless the motion to dismiss raises justiciable issues regarding the merits of the claim, or comes at such an advanced stage of the proceedings that it is manifestly unfair to allow plaintiff an automatic uncontested dismissal. The other cases relied on by the Grand Lodge appear to involve such circumstances, and therefore are not persuasive here, where the proceedings against the Grand Lodge—especially those regarding plaintiff's firing—had not reached an advanced stage, and where the motion to dismiss supported by extraneous matter raised only questions as the jurisdiction and *res judicata*. *See* Toulmin v. Industrial Metal Protectives, 135 F. Supp. 925, 927-928 (D. Del. 1955).

The Grand Lodge also argues that plaintiff's right, if any, to drop his claim against it is governed by Fed. R. Civ. P. 21, which allows a party to be dropped only by court order. This contention is without merit. Under Fed. R. Civ. P. 41(a)(1), the word "action" means all claims against any one defendant, and a dismissal by

notice can be effective against less than all defendants. Terry v. Pearlman, 42 F.R.D. 335, 337 (D. Mass. 1967).

Accordingly, the Grand Lodge's objections to plaintiff's notice of dismissal in Civil Action Number 10463 are overruled.

II.

Count I of the complaint in Civil Action Number 13818 was a claim against the Grand Lodge under LMRDA to the effect that termination of plaintiff's employment as a Grand Lodge press representative violated rights secured by Section 101 of LMRDA, 29 U.S.C.A. §411. The Court ruled that although it does have subject matter jurisdiction over such a claim, and although allegations to that effect do state a claim upon which relief theoretically could be granted, nevertheless a controlling issue of fact in that claim had been adjudicated adversely to the plaintiff in a prior proceeding, and that principles of collateral estoppel required judgment for the defendant on Count I of Civil Action Number 13818. Nix v. The Grand Lodge of the International Ass'n. of Machinists, C.A. No. 13818 (N.D. Ga., filed August 13, 1970).

The Grand Lodge requests reconsideration of the decision that there is subject matter jurisdiction and that Count I states a claim upon which relief theoretically can be granted. But this request includes no legal authority, and raises no points not already considered. Accordingly, this aspect of the prior decision stands.

Plaintiff requests reconsideration of the decision that by virtue of collateral estoppel, the determination of the NLRB that he was fired for pilfering documents from a superior, specifically upheld upon review in Nix v.

N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969), is controlling in Civil Action No. 13818. Upon further research, that view of collateral estoppel appears correct, and the decision stands as made. *See* Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969); Hyatt Chalet Motels, Inc. v. Salem Bldg. & Constr. Trades Council, 298 F. Supp. 699, 701-703 (D. Ore. 1968). Plaintiff also asserts that the defense of *res judicata* cannot be raised by motion to dismiss. This contention is without merit. *See* Thomas v. Consolidation Coal Co., 380 F.2d 69, 75 (4th Cir. 1967); Larter & Sons v. Dinkler Hotels Co., 199 F.2d 854, 855 (5th Cir. 1952). There is likewise no merit to plaintiff's contention that he has not had an adequate opportunity to be heard on this issue. Local Rule 8(d) provides that usually, all motions are decided on brief without a hearing. The Court is not aware that oral hearings on motions to dismiss or for summary judgment are mandatory under Constitutional principals or the Federal Rules of Civil Procedure. Local Rule 8(b) requires that any response to a written motion be submitted within 10 days thereof. However, this rule is not rigidly enforced, and in fact the Court would probably have considered any brief submitted between the time the motion was originally filed (March 30, 1970)[1] and the date of decision (August 13, 1970).

Finally, plaintiff objects to the restriction placed on his Count II class claim by the order of August 13, 1970. Simultaneously, the defendant argues that the Court should not have allowed the plaintiff to maintain a class

[1]The district court erred. The instant action, Civil Action No. 13818, was not filed until June 3, 1970, and the defendant's motion to dismiss was not filed until June 26, 1970.

action at all, because plaintiff has not and cannot show facts justifying a class proceeding, and because the claim sought to be made as a class action in Civil Action No. 13818 could have been brought originally in Civil Action No. 10463.

Eyers v. Dwyer, 358 U. S. 202 (1958), relied on by plaintiff, does not require that the Court allow plaintiff to bring this action on behalf of every member of IAM in the United States. That decision dealt only with the question whether the individual plaintiff had presented a justiciable claim, and did not reach the question of the scope of the class. Therefore, plaintiff's objection to the restriction is not well taken.

Contrary to the defendant's contention, a complaint in a class action need not state sufficient facts to support the conclusion that a class action can be maintained. Such a requirement would constitute a return to fact pleading, contrary to the intent of the Federal Rules of Civil Procedure. *See* 5 Wright and Miller, Federal Practice and Procedure §1202 (1969). Neither is there substance to the contention that the provisions of Section 101(a)(2) of LMRDA, 29 U.S.C.A. §411(a)(2) preclude a class attack on the IAM's anti-sedition section leaving only the question whether, in the case of each individual, application is unreasonable. Such a section may be overly broad, unnecessarily vague, or otherwise unreasonable on its face.

The Court agrees with the Grand Lodge that the class claim originally brought as Count II of Civil Action No. 13818 should be brought as part of Civil Action No. 10463 rather than as a separate action. The original Civil Action No. 10463 was a claim against Fulton Lodge

No. 2 that plaintiff's rights under LMRDA were violated by his expulsion from membership. That expulsion was based on the premise that certain of plaintiff's conduct violated Article L, Section 3, lines 21-25 of IAM's Constitution. Count II of Civil Action No. 13818 was simply a claim that those same rights (and the rights of persons similarly situated) are violated by the existence and threatened application of that provision of the Union constitution.

Clearly, principles of *res judicata* require that two such interlocked claims be brought in the same lawsuit. *Cf.* Rhodes v. Jones, 351 F.2d 884, 889 (8th Cir. 1965). Therefore, plaintiff may not maintain a separate action on the class claim. However, this case is not in a posture which either requires or persuades the Court to deny plaintiff leave to amend to add the class claim. The issue of damages in Civil Action No. 10463 is still pending. The class claim should not require another hearing, and hopefully the only facts not now of record will relate to the scope of the class.

Accordingly, that part of the Order of August 13, 1970, dealing with Count II of Civil Action No. 13818 (pp. 9 and 10) stands as entered.

IT IS SO ORDERED.

This the 13th day of November, 1970.

s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1395

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee.

versus

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,
Defendants-Appellees-
Cross Appellants.

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(November 17, 1971)

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal has to do with two suits filed in the Northern District of Georgia. In the first, Civil Action No. 10,463, filed pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 USCA, § 401 *et seq.*, plaintiff sought to enjoin his expulsion from union membership and also claimed damages. The district court found that he had been unlawfully disciplined for making statements protected by the free speech provision of the LMRDA, 29 USCA, § 411 (a) (2). Injunctive relief was granted against the Local Lodge and the International Association of Machinists and Aerospace Workers (Grand Lodge). *Nix v. Fulton Lodge No. 2 of IAM*, N.D. Ga. 1967, 262 F.Supp. 1000. The question of damages was reserved.

Both the Local Lodge and the Grand Lodge appealed to this court. The decision below was affirmed in all respects except as to the application of the injunction to the Grand Lodge. We held that the District Court never acquired jurisdiction over the Grand Lodge by virtue of proper designation of the Grand Lodge as a defendant, service of process, or appearance. In reversing as to the Grand Lodge we held that Nix would be entitled, on remand, to amend to seek relief against the Grand Lodge. *Fulton Lodge No. 2 of IAM v. Nix*, 5 Cir. 1969, 415 F.2d 212, 220.

Accordingly, appellant Nix filed an amendment to his complaint in the district court adding the Grand

Lodge as a defendant. However, in the same amendment, he expanded the scope of the suit to allege wrongful discharge from his employment as Press Representative for the Grand Lodge and prayed for reinstatement to employment and other appropriate relief.

The defendants filed motions to dismiss the amended complaint, urging lack of subject-matter jurisdiction, that the complaint failed to state a claim upon which relief could be granted under the LMRDA, or in the alternative, that the claims were barred by principles of *res judicata*. Thereafter, plaintiff filed a notice of dismissal of this amended complaint against the Grand Lodge, thus eliminating the claim for reinstatement to his job as Press Representative for the Grand Lodge and for damages against the Grand Lodge on account of the discharge. The Grand Lodge objected to the dismissal.

Meanwhile, some two months later, plaintiff filed the second suit, Civil Action No. 13,818. Count I of the complaint was addressed essentially to plaintiff's former employment with the Grand Lodge. He alleged wrongful, malicious, and wanton conduct in administering discipline under the IAM constitution which resulted in his discharge from employment and expulsion from union membership. In the way of relief he requested restoration to employment with the union, damages and counsel fees. This complaint contained a second count which sought declaratory and injunctive relief on behalf of all union members against the Grand Lodge's enforcement of Article L, § 3 of the

IAM constitution, on the ground that its provisions authorizing discipline of union members for false or malicious statements against other union members or officers are inconsistent with the free speech provisions of LMRDA, 29 USCA, § 411 (a) (2).

The district court overruled the Grand Lodge's objection to its dismissal from C.A. No. 10,463. Then as to Count I of C.A. No. 13,818, the court ruled that principles of collateral estoppel required judgment for the Grand Lodge on that count. As to Count II, the court over objection from the Grand Lodge, allowed the class action to be brought but narrowed the class. This count was then dismissed with permission granted to plaintiff to add it by amendment to C.A. No. 10,463.

It is plaintiff's position on this appeal that the district court erred in dismissing Count I in C.A. No. 13,818, and in narrowing the class in Count II as well as in dismissing it. The Grand Lodge complains in its cross-appeal of its dismissal in C.A. No. 10,463. This latter suit is now pending in the district court on the claim for damages against the local union. We affirm on the appeal and cross-appeal.

I.

We turn to Count I in C.A. No. 13,818 in which plaintiff sought restoration of his employee status and damages for discharge. The district court concluded that the controlling issues of fact surrounding plaintiff's dismissal from his employment with the Grand Lodge were determined adversely to plaintiff in a prior pro-

ceeding before the National Labor Relations Board which was affirmed by this court in *Nix v. NLRB*, 5 Cir. 1969, 418 F.2d 1001. This earlier determination was held to preclude recovery by plaintiff on Count I. We agree. See, *H. L. Robertson & Associates, Inc. v. Plumbers Local Union No. 519*, 5 Cir. 1970, 429 F.2d 520; *Painters District Council No. 38 v. Edgewood Contracting Co.*, 5 Cir. 1969, 416 F.2d 1081.

II.

As to Count II of the C.A. No. 13,818, both plaintiff and the Grand Lodge take exception to the ruling of the district court. The Grand Lodge contends that no class action will lie on the free speech question presented in connection with Article L, § 3, of the IAM constitution. Plaintiff contends that the court erred in narrowing the class from all members of the Grand Lodge to only those members against whom the provision was being invoked.

On the authority of *Golden v. Zwickler*, 1969, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113, the district court determined that no justiciable "controversy" is present except where Article L, § 3 of the IAM constitution is being invoked against union members. For that reason the district court limited the class to such persons. We agree that only then would the judicial resolution be limited to "... concrete legal issues, presented in actual cases, not abstractions . . ." *United Public Workers of America v. Mitchell*, 1947, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754.

We conclude that there is no merit in either the appeal or cross-appeal as to Count II of the complaint. The cause of action asserted can be included by amendment to C.A. No. 10,463. Plaintiff will not be harmed by such a course and the district court was well within its case management discretion in the action taken. This leaves the matter in the posture where the district court can determine, in the event of amendment, as its order contemplates, whether the matter should proceed as a class action at all, depending on whether the requisites of Rule 23, F.R.Civ.P., are met.

III.

The last issue arises under the cross-appeal of the Grand Lodge wherein it is contended that the district court erred in permitting its dismissal by stipulation under Rule 41(a) (1), F.R.Civ.P.,[1] by plaintiff.

Although no answer had been filed, the Grand Lodge contends that before plaintiff filed his notice of dismissal, it had filed motions which, for purposes of Rule 41(a) (1), should be considered motions for summary judgment which precluded dismissal under the Rule. These motions were based on four grounds: (1) insufficiency of service of process; (2) lack of subject matter jurisdiction; (3) a failure to state a claim upon which relief could be granted; and (4) *res judicata*.

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[1] "(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
(1) By Plaintiff; by Stipulation. . . . an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

No affidavits or other matters outside the pleadings pertinent to (3) or (4) above (motions filed pursuant to Rule 12(b) (6), F.R.Civ.P.), were submitted by the Grand Lodge so as to convert the motions into motions for summary judgment under Rule 56 as provided in Rule 12(b), F.R.Civ.P. By no stretch of the imagination can the Xerox copies of opinions of this court, attached to a memorandum of law submitted by the Grand Lodge in connection with the Rule 12(b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12(b) (6) motion into a motion for summary judgment. Cf. *Miller v. Reddin*, 9 Cir. 1970, 422 F.2d 1264.

The district court did not err in allowing the Rule 41 (a) (1) dismissal.

AFFIRMED.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1395

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

FULTON LODGE NO. 2 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL,
Defendants-Appellees-
Cross Appellants.

FRANKLIN NIX,
Plaintiff-Appellant-
Cross Appellee,

versus

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Nov. 17, 1971, 5 Cir., 1971, ____ F.2d ____).

(January 5, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E

THE NLRB PROCEEDING

In early 1965 the staff employees of the employer union [IAMAW] were the only unit of the IAMAW not represented by an independent bargaining agent. At this time petitioner Nix founded the IAM Representatives Association and initiated an organizing campaign to make Representatives Association the independent bargaining agent for staff employees. Though the employer was itself a union, the year-long organizational effort of the Representatives Association was bitterly opposed by the employer IAMAW. In August 1966, after a representation case and an NLRB election, the Representatives Association received NLRB certification as the bargaining representative for all IAMAW field staff employees. One month later, in September 1966, petitioner was fired with the explanation that there was no more work for him. Petitioner filed unfair labor practice charges with NLRB, alleging violations of Sections 8(a)(1) and 8(a)(3) of the NLRA, as well as an 8(a)(5) refusal to bargain charge.

At trial before an NLRB trial examiner, petitioner was not represented by private counsel. Petitioner was told by government counsel that he would not be permitted to examine or cross-examine witnesses. Neither was petitioner allowed any voice in the introduction or exclusion of documentary evidence, nor a voice in stipulations made at trial. Board attorneys even refused petitioner's request that the witnesses be sequestered, thereby allowing respondent IAMAW Grand Lodge officers to sit together in the hearing room, confer with one another, and repeat each other's testimony on the witness stand.

Before the unfair labor practice charges had come to trial, the respondent IAMAW admitted that its alleged reason for firing petitioner was false, but asserted instead that Nix had been fired for "pilfering" the personal papers of his superior, IAMAW Vice Pesident George Watkins. At trial Nix testified that he had indeed made Xerox copies of union records; records which showed conclusively that Vice President Watkins had been systematically defrauding the union through the embezzlement of union funds. Most of these records were office records to which Nix had full and free access at all times, including times when he was fully in charge of the union's Southern Territory office, and were not "pilfered" in any sense of the word. As to the copying of a day book desk calendar kept by Vice President Watkins, Nix testified that he had made copies of this at the request of the IAMAW's international president.

At trial, petitioner testified that not only had he a right and a duty as a union member to expose the theft of union funds, but also that his activity had been expressly authorized by the very same IAMAW officers who later sought before the NLRB to characterize his actions as "pilfering." At trial, no note was made of the fact that petitioner had made written demands as a union member under § 501(b) of the LMRDA[1] for an accounting and

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[1] 29 U.S.C. §501. Fiduciary responsibility of officers of labor organizations.

(a) Duties of officers; exculpatory provisions and resolutions void.

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its mem-

recovery of union funds misappropriated by Vice President Watkins and other officers. Though the union repeatedly labeled petitioner a "pilferer," scant attention was devoted to the fact that Vice President Watkins, the officer Nix had exposed, had made restitution to the Union by a personal check for the exact amount of funds he had been accused by petitioner of embezzling.

---

bers and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Nix testified that at the request of the IAMAW's international president, he took copies of these documents to Washington in July 1965. Not until 16 months later in November 1966, was petitioner given any notice that his activities were considered "pilfering." This notice came after petitioner had successfully organized the IAM Representatives Association, and after petitioner had been fired for an admittedly false reason in September 1966, one month after winning the staff union election.

Petitioner's repeated efforts to have his alleged "pilfering" considered in light of his rights and duties as a union member and fiduciary under Title V of the LMRDA went unheeded. Petitioner was told by NLRB attorneys that the NLRB lacked jurisdiction over LMRDA and that petitioner would have to litigate LMRDA rights in federal court. Petitioner asserted that since his exposure of union corruption was both a right and a duty under LMRDA and the IAMAW Constitution, it could not be a legitimate ground for discharge under the NLRA. To this the Board attorneys replied that they were concerned only with rights under the NLRA; that they could not enforce rights under any other Act; and that they would not litigate matters pertaining to the internal union affairs of the IAMAW.

Thus while attorneys for the General Counsel concerned themselves with proving that petitioner had been unlawfully discharged for organizing the Representatives Association, the testimony regarding petitioner's alleged "pilfering" was never challenged in light of his LMRDA rights. At no point in the NLRB proceeding was there any argument, recognition or consideration of petition-

er's rights and sworn duties as a union member under the IAMAW Constitution and the LMRDA.

The trial examiner found that the General Counsel had established a prima facie case of discriminatory discharge from employment but held that petitioner's alleged "pilfering" was a legitimate reason for discharge.[2] On appeal to the NLRB, the trial examiner's decision was affirmed. IAM, 172 NLRB No. 239 (Sept. 18, 1968). On appeal before the Court of Appeals for the Fifth Circuit, an appeal based upon the NLRA and not the LMRDA, the NLRB decision was affirmed. *Nix v. NLRB*, 418 F.2d 1001 (5th Cir. 1969).

The Filing of the LMRDA Action

The current action was thus commenced in federal district court as an amendment to an earlier LMRDA action (C.A. No. 10463) in which petitioner had sought and won a permanent injunction against his expulsion from the IAMAW, and against interference with his rights of free speech under § 101(a)(2) of the LMRDA.[3]

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[2]A typical illustration of the difficulties and impossibilities petitioner encountered in attempting to have the NLRB recognize his union membership rights under LMRDA, is seen in two demands he made upon the IAMAW officers for recovery and an accounting of misspent funds under § 501(b) of LMRDA. The two written demands specified the LMRDA section upon which they were based and were signed by petitioner *as a union member*, not as an employee, with his union membership card number as specified by the IAMAW Constitution. The second demand was made because the IAMAW officers had ignored the first demand. In his decision the NLRB trial examiner, without reference to the union membership-LMRDA nature of the two demands, characterized them as an "unremitting attack" by Nix, as an *employee*, against his employers.

[3]The IAMAW's illegal attempt to expel petitioner from union membership for exercising his free speech rights under §101(a)(2) came only a week after petitioner was discharged from employ-

This injunction was affirmed by the Fifth Circuit Court of Appeals in *Nix v. Fulton Lodge No. 2*, 415 F.2d 212 (5th Cir. 1969). Unfortunately, at the time petitioner sought his free speech and membership restoration injunction, his charges regarding his discharge from employment were still awaiting a hearing before the NLRB, and the IAMAW had not at that time changed its defense from that of having no work for Nix to that of his being a "pilferer." Thus, at the outset of his LMRDA membership action, Nix had no cause to assert that he had been discharged for asserting any of his membership rights under LMRDA. Only after he was accused of "pilfering" was it apparent that petitioner had been discharged for exercising his right to expose union corruption under Title V of the LMRDA.

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ment in September 1966. During the NLRB hearing on petitioner's discharge from employment, the trial examiner took no notice of the IAMAW's collateral attack on petitioner's union membership.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1247

FRANKLIN NIX, *Petitioner,*

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 452 F.2d 794 (Pet. 1C-7C). The opinions of the District Court, originally and on rehearing, are reported respectively at 78 LRRM 2915, 2919 (Pet. 1A-11A, 1B-8B). The opinions of the National Labor Rela-

tions Board and the Court of Appeals in a companion unfair labor practice proceeding are reported respectively as *International Association of Machinists and Aerospace Workers, AFL-CIO*, 172 NLRB No. 239, 69 LRRM 1148 (1968), and *Nix* v. *N.L.R.B.*, 418 F.2d 1001 (C.A. 5, 1969).

QUESTION PRESENTED

In an unfair labor practice proceeding in which the employee participated or had the opportunity to participate in full, the National Labor Relations Board found, with the affirmance of the Court of Appeals on judicial review, that the employee had been discharged by his union-employer for pilfering documents from his superior and not for his union activity. The question presented is whether the employee as to the identical discharge is collaterally estopped from claiming in a later action brought by him in a United States District Court that the basis for his discharge was that he had exercised his free speech rights guaranteed him by Section 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959.

STATEMENT

On August 31, 1966, Petitioner Franklin W. Nix was discharged by Respondent International Association of Machinists and Aerospace Workers (the Union) from his position as a Press Representative of the Union (AI 39[1]). On September 6, 1966, Nix filed an unfair labor practice charge with the National Labor Relations Board claiming that he had been dis-

[1] "AI" refers to the printed appendix before the Court of Appeals in the unfair labor practice proceeding.

missed because of his union activity (AI 4-7). On November 8, 1966, based on his charge, the NLRB General Counsel issued a complaint alleging that Nix had been discharged "because of his membership in and activities on behalf of" a labor organization known as the IAM Representatives Association (AI 11, 9). On November 18, 1966, in answer to that complaint, the Union averred that Nix had been discharged for "stealing property of the . . . Union as well as the personnel effects of his immediate superior . . ." (AI 15-16).

A five-day hearing on the complaint was held in the latter part of April 1967 (AI 36), devoted in major part to Nix's discharge. The NLRB Rules and Regulations provide, then as now, that a "party" shall include "any person filing a charge" (§ 102.8); that "'[a]ny party shall have the right to appear at such [unfair labor practice] hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence" (§ 102.38); and that any party "may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner" (§ 101.10(a)). *International Union, UAW* v. *Scofield,* 382 U.S. 205, 219 (1965).

At the hearing Nix testified in support of his claim that he had been discharged for his union activity, and his direct and cross-examination pertaining to the reason for his discharge consumed 119 pages (AI 256-375). Other witnesses testified for and against him on this question, and a mass of documentary evidence pro and con relevant to it was introduced. Lengthy briefs supporting and opposing Nix's position were

filed with the NLRB Trial Examiner after the close of the hearing.

On September 8, 1967, the Trial Examiner issued his decision (AI 36-109), of which 24 pages were devoted to Nix's discharge (AI 39-63). The examiner concluded that Nix had pilfered documents from his superior; that "pilfering of documents by employees is . . . serious misconduct;" and that the Union had "discharged Nix because of his misconduct" (AI 60-63).

Nix and the NLRB General Counsel filed exceptions to the Trial Examiner's decision with the NLRB (AI 120-155). Nix detailed his exceptions in 31 pages (AI 124-155). He filed four post-hearing motions with the NLRB (AI 156, n. 1). Briefs supporting and opposing his position were filed with the NLRB. The NLRB affirmed the examiner's decision with respect to Nix (AI 157-158, 171-172).

Nix petitioned the Court of Appeals for the Fifth Circuit to review the NLRB's decision. On November 19, 1969, after complete review, the Court of Appeals affirmed the NLRB. *Nix* v. *N.L.R.B.*, 418 F.2d 1001. It carefully summarized the facts and fully analyzed the basis for the NLRB's holding, "affirming the trial examiner's finding, . . . that Nix was discharged for pilfering documents from his superior at IAM and not because of his union membership and activity" (418 F.2d at 1005). It concluded that (*id.* at 1010):

> We hold that substantial evidence on the record considered as a whole supports the Board's finding that . . . Nix . . . [was] discharged for cause and not because of . . . [his] union membership and activity. Nix's discharge for pilfering his

> superior's personal papers . . . [was] legitimate grounds for discharge. The Board properly concluded that the General Counsel failed to sustain his burden of proof that the discharge of . . . Nix . . . was only a pretext to conceal dismissal for membership and activities in IAM's staff representatives' Association. The Board's finding that Nix . . . [was] discharged for legitimate reasons is a reasonable inference easily within the Board's power to draw. As recently stated by this Court, " 'the evidence of legitimate motive by the employer is sufficiently compelling that implications of illegality cannot control [these discharges] * * *.' "

On June 3, 1970, subsequent to the decision of the Court of Appeals, Nix filed a complaint with the United States District Court for the Northern District of Georgia bringing into issue the basis for the identical discharge, Nix this time claiming that the Union "acted maliciously, wantonly, and in reckless disregard of . . . [his] membership rights in disciplining . . . [him] by terminating his employment . . . for exercising rights secured to him by Section 101(a)(2) of . . . [the Labor Management Reporting and Disclosure] Act, and such discipline is unlawful under the provisions of Section 609 of said Act" (AII 72[2]). The Union moved to dismiss the complaint "upon principles of collateral estoppel," averring that Nix had "fully litigated the cause of action sought to be alleged . . . . before the National Labor Relations Board", and requesting that "the Court take notice of the decision of the United States Court of Appeals for the Fifth Circuit in . . . *Nix* v. *National Labor*

[2] "AII" refers to the printed appendix before the Court of Appeals on the instant appeal.

Relations Board, 418 F.2d 1001. Plaintiff is estopped from relitigating the legal and factual issues and the cause of action litigated in that proceeding" (AII 84-85). Nix did not respond to this motion. On August 12, 1970, the District Court dismissed the complaint on the ground that "the controlling issue of fact . . . has been determined adversely to the plaintiff in a prior proceeding, and that under principles of collateral estoppel, that determination precludes recovery here" (Pet. 8A, AII 28). The District Court explained that (Pet. 8A, AII 28-29):

> When the plaintiff was fired, he filed unfair labor practice charges with the NLRB, alleging a discriminatory discharge in violation of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act . . . . However, the Board found as a matter of fact that Nix had been discharged for pilfering documents from his superior at IAM. Nix v. N.L.R.B., 418 F.2d 1001, 1005 (5th Cir. 1969. On petition for review of the Board's decision, the Court of Appeals affirmed that finding of fact by ruling that there was substantial evidence to support the Board's finding that Nix was discharged "for cause." Nix v. N.L.R.B., 418 F.2d 1001, 1010 (5th Cir. 1969).
>
> . . . [U]nder the principles of collateral estoppel, the Board's finding of fact—made after an adversary hearing and upheld on judicial review—controls the issue of the reasons Nix was fired.

Nix moved the District Court for reconsideration (AII 46-54), claiming that "determination of the issue of estoppel . . . has deprived . . . [him] of due process of law on this issue" (AII 53), but not particularizing in any concrete way any specific reason for not estop-

ping him. On November 16, 1970, the District Court rendered an opinion adhering to its decision (Pet. 1B, 5B-6B, AII 54, 58-60), and rejecting Nix's abstract claim that "he has not had an adequate opportunity to be heard on this issue" (Pet. 6B, AII 60).

On appeal, the Court of Appeals affirmed, agreeing with the District Court that "the controlling issues of fact surrounding plaintiff's dismissal from his employment with the Grand Lodge [Union] were determined adversely to plaintiff in a prior proceeding before the National Labor Relations Board which was affirmed by this court. . . ," and this "earlier determination" precludes "recovery" by Nix on his present claim (Pet. 5B-5C).

ARGUMENT

No question meriting review is presented, no conflict of decision exists, and the petition should therefore be denied.

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."[3] Collateral estoppel effect has been given to findings of the NLRB,[4] as to findings of other administrative agen-

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[3] *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

[4] *E.g., Painters District Council No. 38* v. *Edgewood Contracting Co.*, 416 F.2d 1081 (C.A. 5, 1969); *H. L. Robertson & Associates* v. *Plumbers Local Union No. 519*, 429 F.2d 520 (C.A. 5, 1970); *Paramount Transport Systems* v. *Teamsters Union*, 436 F.2d 1064 (C.A. 9, 1971).

cies.[5] There is no reason in principle why collateral estoppel should not apply.

To invoke collateral estoppel notice of the defense must be given the opposing party in order to afford him a "chance to argue, if he can, why the imposition of an estoppel would be inappropriate."[6] Petitioner was informed from the first that the plea was being invoked against him (*supra*, pp. 5-6). Yet he has never articulated a single concrete reason why he should not be estopped. Neither before the District Court, the Court of Appeals, nor in this Court has he particularized or substantiated any basis in fairness for according him a second opportunity to litigate the factual cause for his discharge.

Petitioner baldly asserts, without the slightest attempt to substantiate the claim at any point in any court, that he was not permitted to participate in the hearing before the examiner (Pet. 17). But he obviously had the right to participate as a party as fully as he chose (*supra*, p. 3), and he elected instead to have his interest at the hearing prosecuted by the NLRB General Counsel.[7] He was represented at the

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[5] *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387 (C.A. 5, 1969); *Seguros Tepejac, S.A.* v. *Jernigan*, 410 F.2d 718 (C.A. 5, 1969).

[6] *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313, 350 (1971).

[7] "When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a "party", he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order . . . ." *International Union, UAW* v. *Scofield*, 382 U.S. 205, 219 (1965).

hearing fully, diligently, and energetically; he does not show what, if anything, was done or omitted at the hearing that worked to his disadvantage, or what would or could have changed the result; he does not claim that any evidence was not adduced that should have been, or that any was adduced that should not have been. His assertion of prejudice is altogether abstract. Furthermore, the NLRB General Counsel properly acted for Petitioner at the hearing, and "[w]here a judgment is rendered in an action in which a party thereto properly acts on behalf of another, the other is bound by or entitled to the benefits of the rules of res judicata with reference to such of his interests as at the time are controlled by the party to the action." Restatement, Judgments, § 85(1)(a) (1942).

Indeed, Petitioner explicitly disclaims any desire to show the existence of any circumstances which would establish that he is not appropriately estopped by the NLRB finding (Pet. 19). He seeks instead an absolute rule that, "as a matter of law, . . . an NLRB adjudication of a union member's unfair labor practice charges is not a bar to such member's subsequent action in district court to enforce his rights under the LMRDA" (Pet. 19-20). And his reason is that the NLRB in enforcing the National Labor Relations Act has no jurisdiction to adjudicate claims arising under the Labor Management Reporting and Disclosure Act (LMRDA) (Pet. 12-15). But Petitioner patently misses the point. The NLRB is clearly empowered, in the enforcement of the National Labor Relations Act, to find the cause of an employee's discharge, and in this case it found that Petitioner was discharged for pilfering documents from his superior. That finding,

within the competence of the NLRB to make, conclusively establishes the reason for his discharge, and refutes any claim that he was dismissed in violation of his statutory rights, whether under the National Labor Relations Act or the Labor Management Reporting and Disclosure Act.

In short, one five-day hearing on the reason for Petitioner's discharge is enough. Petitioner is not entitled to a second five-day hearing in an effort to persuade another trier that he was not fired for pilfering documents. "In the present case the Board was acting in a judicial capacity when it considered . . . [Petitioner's] claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties." *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1972

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IN THE

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OCTOBER TERM, 1971

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FRANKLIN NIX,

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THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

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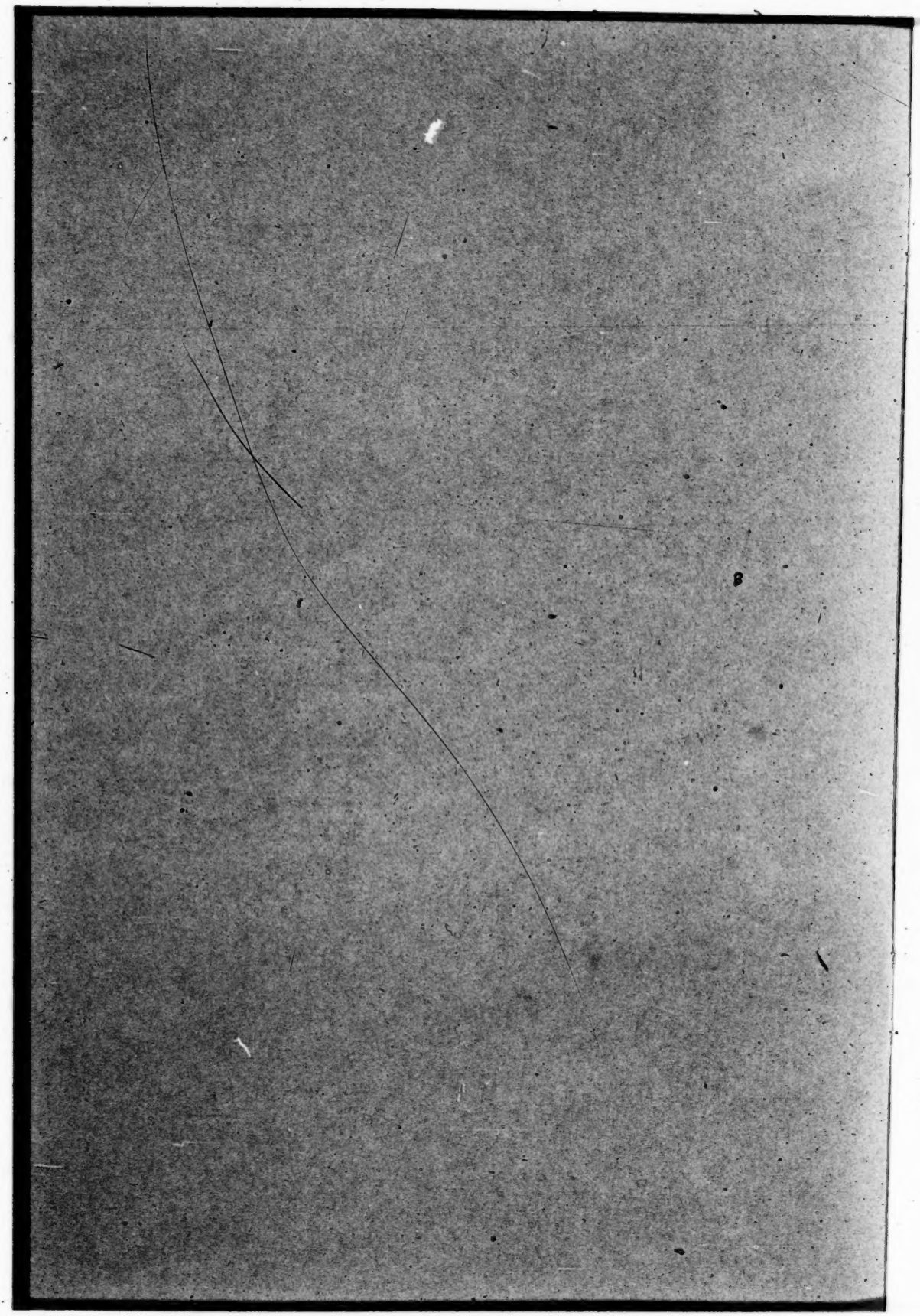

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Petitioner,

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY MEMORANDUM

There is nothing "abstract" (Brief in Opp., p. 7) about Petitioner's allegation that he has not been afforded procedural due process. When Respondent filed its bare motion to dismiss on the ground, *inter alia*, of collateral estoppel, a motion supported only by a

memorandum of law, Petitioner was admittedly put on notice of the *defense*, but he was not in any way put on notice of the District Court's contemplation of *summary judgment*. Since the Respondent never moved for summary judgment and since the District Court never announced its contemplation of summary judgment under Rule 12 (b), Petitioner had no notice whatsoever of pending summary judgment.

The District Court entered no order or notice in Civil Action No. 13818 except its order granting summary judgment in favor of Respondent. The only correspondence which Petitioner received from the District Court after the case at bar was filed, pertained only to an order directing Respondent to show cause in the companion Civil Action No. 10463, why Petitioner's voluntary dismissal of C. A. 10463 as to Respondent should not be upheld.

In stating that Petitioner "has never articulated a single concrete reason why he should not be estopped" (Brief in Opp., p. 8), Respondent gives the impression that Petitioner is under some burden to meet an affirmative defense that was never established in the District Court. Respondent *invoked* the affirmative defense of collateral estoppel, but it has not shown and cannot show this Court that it carried the burden of establishing such a defense. Respondent never submitted "matters outside the pleading" sufficient to trigger the proper use of Rule 12 (b). Indeed, without submitting the record of the prior NLRB hearing to the District Court, the Respondent had no way of establishing for purposes of collateral estoppel that the LMRDA issues regarding Petitioner's discharge had in fact been tried, and that there were no genuine

issues which remained to be tried. As the Court of Appeals held in affirming the District Court's *refusal* to grant summary judgment in the companion Civil Action No. 10463:

> "By no stretch of the imagination can the Xerox copies of opinions of this Court attached to a memorandum of law submitted by Grand Lodge in connection with the Rule 12 (b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12 (b) (6) motion into a motion for summary judgment." (Pet. C-7)

And as this Court stated in *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160 (1970):

> "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*"

Plainly, Petitioner has no burden to meet an affirmative defense where, as here, the Respondent has not carried the initial burden of presenting evidentiary matter in support of its motion.

In this area of procedural due process under Rules 12 (b) and 56 (c), there are controlling facts which Respondent has not denied. Petitioner was not given notice of summary judgment, a hearing, or any reasonable opportunity to present matters in opposition to summary judgment. Respondent has not refuted and cannot refute the fact that the District Court did not comply with Petitioner's procedural rights under the Federal Rules. Petitioner respectfully asserts that these facts alone are sufficient to motivate the exercise of this Court's power of supervision, even if that supervision is limited merely to a summary reversal of the decision below.

By quoting the Rules and Regulations of the NLRB, Respondent has sought to show that Petitioner "had the right to participate as a party as fully as he chose . . ., and he elected instead to have his interest at the hearing prosecuted by the NLRB General Counsel." (Brief in Opp., p. 8). But in quoting the Board's rules, Respondent omitted the crucial portion italicized below:

> §102.38 Rights of parties.—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, *except that the participation of any party shall be limited to the extent permitted by the trial examiner:* And provided further, That documentary evidence shall be submitted in duplicate. (Emphasis added). 29 C. F. R. §102.38 (1970).

As may readily be seen from the Board's own rule, Petitioner's participation in the NLRB hearing was subject to the trial examiner's discretion, and Nix had no absolute "right" to control or participate in the proceedings. Nowhere does it appear in the record that Petitioner was able to participate other than by giving his own oral testimony. Petitioner sat powerless in the hearing, unable to have his LMRDA rights presented or considered, not by his own choice but because the trial examiner had informed Board counsel that Petitioner would not be permitted to participate.

Respondent quotes the decision of this Court in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394, 422 (1966) for the proposition that the courts have not hesitated to apply *res judicata* to administrative agency decisions. (Brief in Opp., p. 7). But such doctrines of finality are not appropriate where,

as here, disputed LMRDA rights were never properly before the NLRB, nor did Petitioner have an opportunity in fact or theory to litigate his LMRDA rights.

Respondent misapplies those cases cited as authority for giving collateral estoppel effect to the findings of the NLRB in this case. (Brief in Opp., p. 7, n. 4). The critical distinction to be recognized is that the NLRB *and* the federal courts have *primary* jurisdiction to determine the existence of secondary boycotts. In such a situation there exists no strict jurisdictional dichotomy such as that existing between the NLRB under the NLRA and the federal courts under the Landrum-Griffin Act.

Contrary to the inference made by Respondent, the petitioner does not assert that the trial examiner or the Board attorneys were prejudiced. (Brief in Opp., p. 9). Petitioner recognizes that these men were primarily concerned with determining whether the employer union was guilty of unfair labor practices, and not whether the union had unlawfully disciplined Nix for exercising his LMRDA rights. (Pet., p. 16). Theoretically, Petitioner's LMRDA rights as a union member could have been presented in the NLRB hearing, and the trial examiner could have concluded that Petitioner had been fired for exercising his membership rights and fiduciary duties in exposing union corruption. But these speculations concern a subject which Congress has entrusted to the federal courts and not the NLRB.

On what basis could the trial examiner have awarded relief for a violation of the LMRDA? And even if the trial examiner had presumed to reinstate Petitioner on the basis of his Landrum-Griffin Act rights, the Board could not have awarded the broad injunctive relief or the damages appropriate in this case. Indeed, had the

trial examiner or the NLRB overstepped their jurisdiction in such a manner, it is the Respondent who would be entitled to cry foul, and who doubtlessly would now be seeking to defend its LMRDA liability before the proper forum—the federal courts.

Respondent states that "Petitioner explicitly disclaims any desire to show the existence of any circumstances which would establish that he is not appropriately estopped by the NLRB finding . . . ." (Brief in Opp., p. 9). Here again Respondent looks to Petitioner to meet an affirmative defense which Respondent has invoked but never established with evidentiary support. Respondent would have Petitioner argue the facts of his case before this Court. But Petitioner has been denied the opportunity to build a trial record on his LMRDA rights. That is precisely why Petitioner has come to this Court with an important question of federal labor law jurisdiction.

One final point needs to be addressed. While the NLRB is clearly empowered, in the enforcement of the NLRA, to find the cause of an employee's discharge (Brief in Opp., p. 9), it is not empowered to determine under the LMRDA whether a union official has been unlawfully disciplined for the exercise of protected LMRDA rights. The latter finding is not within the competence of the NLRB because the NLRB does not concern itself with the essence of LMRDA claims—internal union affairs.

The NLRB functions well as a mediator of the economic strife between corporate employers and their organized employees. But the Board thinks mainly in employer-employee terms and not in terms of the union-member relationship. The distinction is extremely

critical, because it represents fundamental differences in perception between the NLRB under the NLRA and the federal courts under the LMRDA. Had petitioner merely been some corporate official who caught his superior defrauding the corporation, there is no law which would have prevented his discharge, laudable as his intentions might have been. But in the union-member context Congress has decreed that union members shall have certain rights and be able to exercise those rights free of unlawful discipline. And one of those rights is the right to keep one's union free of the very financial corruption and abuses which prompted the passage of the LMRDA. Nix stood in the position of a fiduciary under §501 (a) of the LMRDA. (Pet., 2-E). However in the strange world of union ethics, the man who gets documentary proof of his superior's embezzlement is denounced as a "pilferer" and fired from his job, while the union vice president who was caught embezzling union funds makes restitution and continues to draw a fat salary. One wonders if anyone is keeping that vice president honest now. If union officials, who occupy positions of trust and who because of their intimate knowledge of internal union affairs stand the only chance of discovering union corruption in high places, can be discharged in the name of "pilfering" when they discover the financial abuses of their superiors, then unions and their treasuries have lost their best watchdogs and Title V of the LMRDA has become largely a hollow promise. The late Joseph A. Yablonski paid for such watchfulness—first with his job and then with his life.

CONCLUSION

Petitioner has presented two questions which merit review. In light of the abridgement of Petitioner's due process rights, perhaps it is time that this Court reaffirm the due process requirements of summary judgment procedure and remind the federal courts that these procedures were not conceived as loose guidelines subject to judicial waiver, but rather as protective checklists which, when followed, safeguard the substantive federal rights of all parties. In light of the purposes of the LMRDA, the exclusive jurisdiction of the federal courts over it, the NLRB's lack of jurisdiction over and concern with internal union affairs, and the Board's inability to provide broad redress to the unlawfully disciplined union member, it is Petitioner's earnest contention that these factors should preclude preemption of federal court jurisdiction over the LMRDA by application of the doctrine of collateral estoppel to an NLRB proceeding. Accordingly it is requested that the petition for writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Reply Memorandum upon the Respondent by mailing a copy of same, with postage first-class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for Respondent.

This 9th day of May, 1972.

WILLIAM G. MCRAE
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